SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 389

JEROME TREMONT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 5638

RONALD LEACH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A, No. 389) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1970 (Pet. App. B, No. 389). In No. 389, the petition for a writ of certiorari was filed on July 14, 1970. In No. 5638, Mr. Justice Brennan ordered the time for filing a petition for a writ of certiorari extended to and including July 31, 1970, and the petition was filed on July 30, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

In No. 389:

1. Whether, in a prosecution for making false statements in an FHA credit application and conspiracy to do so, the government improperly failed to disclose before trial that an accomplice would be a government witness where the indictment alleged that the conspirators other than the two petitioners were unknown.

In Nos. 389 and 5638:

2. Whether the trial court acted within its proper discretion in granting only part of the defense request for a bill of particulars.

3. Whether the evidence was sufficient to support petitioners' convictions under 18 U.S.C. 1010.

4. Whether the court erred in failing to give an instruction on the theory of petitioners' defense.

STATEMENT

After a jury trial in the United States District Court for the District of Massachusetts, petitioners Tremont and Leach were convicted of making false statements in an application for a Title I FHA home improvement loan in violation of 18 U.S.C. 1010 and of conspiracy to violate that section. The charges related to a $3,000 loan obtained from the Lynn Safe Deposit and Trust Company in May 1968, purportedly to improve a building petitioners were purchasing. Count I of the indictment charged them with stating in the loan application that the proceeds would be used to improve the property, knowing this representation to be false. Count II charged the making of a false statement by omitting to list an outstanding indebtedness on the application as required by law. Count III charged a conspiracy with "divers other persons unknown" to make the false statements. Each petitioner was sentenced to concurrent two year prison terms and fined $5,000. The court of appeals affirmed (Pet. App. A).

The evidence showed that Tremont, on behalf of New Boston Realty Trust, agreed to buy property at Pickman Street in Salem owned by Empire Homes. He paid a $100 deposit on the total price of $14,000 and agreed to assume a first mortgage of $11,200 and execute a second mortgage for $2,000 (Tr. 2-22-23, 62-63).[1] Tremont and Leach subsequently talked

[1] "Tr." refers to the transcript of the trial testimony, which is contained in Volume II of the Record in No. 389 on file before this Court.

with Smith, the installment loan officer of the Lynn bank, about an application for an FHA loan on the property.[2] Tremont and Leach said they wanted the loan in order to buy into a business. The three parties agreed that the only way the loan could be made was through an approved FHA improvement loan (Tr. 2-101-102, 113). An application accordingly was filed. On item 10 of that application, it was indicated that the proceeds of the loan would be used for "new kitchen and living room." In response to item 8, on which all debts of the applicant were to be listed, there was no mention of the mortgages on the property; there was only a reference to "Salem Coop.," which Smith testified he inserted later (Tr. 2-110). Smith testified that neither Tremont nor Leach told him about a second mortgage (Tr. 3-49).[3]

Leach signed the loan application in Smith's office in the presence of Smith and Tremont (Tr. 2-98-100). After the loan was authorized, Leach signed a note payable to the bank and received from Smith the bank's $3,000 treasurer's check. This check was endorsed by Leach as payee and Tremont as trustee for the First Financial Realty Trust and cashed at

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[2] Tremont had previously asked Smith to have the bank lend him money so that he could buy the National Sales Company. Smith said that the bank loans could not be direct, but would have to be indirect, FHA loans (Tr. 2-108-109; 3-51-52). Smith talked to Tremont about the possibility of going to work for him at National Sales Company at some future date (Tr. 2-107; 3-28).

[3] In its response to petitioners' requests for particulars, the government specified the $2,000 second mortgage as the debt omitted from the FHA application on which the charge under Count II was based (Record in No. 389, Vol. I, p. 20).

the Garden City Trust Company. From the proceeds, $2,000 was deposited in a joint account Leach and Tremont maintained in the name of First Financial Realty Trust to cover a $700 over-draft (Tr. 1-48-50, 53).

Several days after obtaining the loan, Leach, identifying himself as an associate of Tremont at New Boston Realty Trust, telephoned Temkin of Empire Homes to inquire about a date for passing title to the Pickman Street property (Tr. 2-24). He also asked Temkin for an estimate to remodel two kitchens for $3,000 "so I can show my investors so I can give you the go-ahead after I buy the property" (Tr. 2-25). Leach, Temkin and their attorneys arranged for the transfer of title two days later (Tr. 1-67-68). Empire Homes, Inc. deeded the property to Leach, who executed a second mortgage and note to Toby F. Temkin (Temkin's wife), for $2,300.

Frank Rybicki, the first floor tenant at 13 Pickman Street, testified that when Leach indicated he was the new owner of the property, he made no reference to repairing his kitchen and living room (Tr. 2-73-74). Only several months later, after Rybicki had been interviewed by the FBI, did Leach come with a contractor to make repairs (Tr. 2-75-77, 92-94). Rybicki testified that he wanted no "upheaval" in the apartment at that time because his wife was recovering from an operation (Tr. 2-80-81). Frances Wingate, the second floor tenant, testified that Leach did not install a new kitchen or new living room in her apartment (Tr. 1-61).

Petitioner Leach testified that he was a business broker and consultant (Tr. 3-86).[4] He stated that prior to filing the FHA loan application, he had not spoken to Temkin or any of the tenants, and had not been inside the building (Tr. 4-16-18). He stated that he left item 8 of the application concerning indebtedness blank because he hoped to consolidate the two mortgages into one under which his payments would not exceed rental income from the property (Tr. 3-92). Leach further testified that a month after he obtained the FHA loan, he acquired one-third and Tremont a two-thirds interest in the National Sales Company for a total purchase price of $45,000 (Tr. 4-4-5).

ARGUMENT

1. The government did not act improperly in failing to disclose before trial that Smith, the bank loan officer, would be a government witness (No. 389 Pet. 2, 11-12, 14). There is no requirement that the government provide a list of its witnesses.

Smith's appearance as a witness did not unfairly prejudice petitioners, despite the fact that the government indicated in the indictment that other conspirators were unknown. The government is not required to name or join all alleged co-conspirators in an indictment or explain omissions. *Prichard* v. *United States*, 181 F.2d 326, 330 (C.A. 6), affirmed, 339 U.S. 974; *Katz* v. *United States*, 273 Fed. 157, 159 (C.A. 1). There was no "surprise" when Smith was

[4] Petitioner Tremont did not testify at the trial.

called. Both petitioners had negotiated personally with him in obtaining the loan and should reasonably have assumed he might testify. In any event, the defense's request for an early afternoon recess prior to cross-examining Smith was granted (Tr. 2-115). The following day counsel were able to attempt to impeach Smith with evidence of his two prior convictions under 18 U.S.C. 1010 and a pending motion for reduction of sentences imposed under them. Petitioners have not indicated what further evidence they would have been able to adduce concerning Smith or his participation in the offense had they been given notice prior to trial that he would testify. The cross-examination of Smith, together with the court's instruction that, if he was an accomplice, his testimony should be "closely examined and weighed with great care" (Tr. 5-15), provided the defense with a response to his testimony as effective as it would have had with more notice.

2. The trial court acted properly within its discretion under amended F. R. Crim P. 7(f) in denying in part petitioners' motion for particulars (No. 389, Pet. 7). Of five requests, the court granted two, regarding the amount, date and recording of the debt which the government alleged in Count II was not disclosed in the loan application. The court refused three items seeking the specific false statements, the defendant who made them and the "other overt Acts" alleged in Count III. That count described the nature of the conspiracy, indicating the bank to which the false statements were made to obtain the loan and the type of loan. The statement of "overt

acts" already specified four dates, the names of three persons, the address of the property, and named various documents relating to the loan. As such, Count III was sufficiently specific to apprise petitioners of the nature of the charge against them and permit them to prepare adequately for trial.

3. The evidence was sufficient to support petitioners' convictions under Counts I and II. (No. 389 Pet. 2, 17; No. 5638 Pet. 10-11). The evidence showed under Count I that the purpose of the loan was not to install new kitchens and a living room as stated on the FHA loan application. Smith testified that petitioners wanted to use the loan money to buy into a business. In addition, petitioners used $2,000 of the $3,000 loan to cover their overdrawn checking account in the name of the First Financial Realty Trust.

Under Count II, the evidence showed that Leach, an experienced business broker and consultant, certified that all his statements were true knowing that this was not the case. He testified that he deliberately left blank the indebtedness part of the FHA form because he hoped to consolidate the two mortgages. This does not excuse his false statement. Tremont signed the purchase and sale agreement which recited mortgage indebtedness and was present when Leach signed the loan application and when Leach received the $3,000 check which he and Tremont endorsed and cashed. From these facts, the jury was justified in inferring Tremont's knowing participation.

4. The court did not err in refusing to give petitioners' instruction presenting their theory of defense (No. 389 Pet. 2, 15-16; No. 5638 Pet. 11-13). This

contention is answered in the opinion of the court of appeals, upon which we rely (Pet. App. A, 25-28).

CONCLUSION

For the reasons stated it is respectfully submitted that the petitions for writs of certiorari should be denied.

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